IN THE

Supreme Court of the United States

October Term, 1976

No. 76-713

LA SALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL and ST. MICHAEL SCHOOL,

Appellants,

—and—

YESHIVAH RAMBAM,

Appellant,

—against—

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT JURISDICTIONAL STATEMENT of APPELLANTS LA SALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL and ST. MICHAEL SCHOOL and of APPELLANT YESHIVAH RAMBAM

RICHARD E. NOLAN
Attorney for Appellants La Salle Academy, Long Island Lutheran High School and St. Michael School
1 Chase Manhattan Plaza
New York, New York 10005
Tel.: (212) 422-3400

DENNIS RAPPS
Attorney for Appellant Yeshivah Rambam
National Jewish Commission on Law and Public Affairs (COLPA)
66 Court Street
Brooklyn, New York 11201
Tel.: (212) 875-5360

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1976

No. .....

LA SALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL and ST. MICHAEL SCHOOL,

Appellants,

—and—

YESHIVAH RAMBAM,

Appellant,

—against—

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT JURISDICTIONAL STATEMENT of APPELLANTS LA SALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL and ST. MICHAEL SCHOOL and of APPELLANT YESHIVAH RAMBAM

Appellants La Salle Academy, Long Island Lutheran High School and St. Michael School and appellant Yeshivah Rambam appeal from the judgment of the United States District Court for the Southern District of New York, permanently enjoining the enforcement of a statute of the State of New York as applied to them, and they submit this Statement to show that this Court has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinion of the District Court, upon which the judgment appealed from was entered, is reported at 414 F.Supp. 1174 and set forth in the Appendix hereto, commencing at page 1a.

Jurisdiction

This suit was brought pursuant to 28 U.S.C. §§1343(3) and 2281, 2284, among other sections, to enjoin the enforcement of a New York statute as being in violation of the First Amendment to the United States Constitution. The judgment of the District Court was entered on July 28, 1976. A copy of the judgment is set forth in the Appendix, pages 15a-16a. Appellant Yeshivah Rambam filed its Notice of Appeal in the District Court on September 21, 1976. Appellants La Salle Academy, Long Island Lutheran High School and St. Michael School filed their Notice of Appeal on September 23, 1976.[1] Copies of the respective notices are set forth in the Appendix at pages 17a and 19a.

---

[1] On October 29, 1976, the appeal of defendants Levitt and Nyquist was docketed in this Court, No. 76-595.

The jurisdiction of this Court to review the judgment of the District Court by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). Recent cases sustaining the jurisdiction of this Court to review the judgment in this case on direct appeal include *Lemon* v. *Kurtzman, Earley* v. *DiCenso* and *Robinson* v. *DiCenso,* 403 U.S. 602 (1971), *Levitt* v. *Committee for Public Education & Religious Liberty,* 413 U.S. 472 (1973), and *Meek* v. *Pittenger,* 421 U.S. 349 (1975).

Statute Involved

The statute involved is Chapter 507, as amended by Chapter 508, of the 1974 Laws of New York,[2] entitled "An Act to provide for the apportionment of state monies to certain nonpublic schools, to reimburse them for their expenses in complying with certain state requirements for the administration of state testing and evaluation programs and for participation in state programs for the reporting of basic educational data", the full text of which is set forth in the Appendix, commencing at page 22a.

Question Presented

Whether Chapter 507, which provides for reimbursement of nonpublic schools of the actual costs incurred by them in administering state-prepared examinations and in compiling attendance and other reports for the State, is in conformity with the Establishment Clause of the First Amendment, as interpreted by this Court in *Levitt* v. *Committee for Public Education & Religious Liberty, supra,* or whether, as the District Court found, the statute is unconstitutional in view of *Meek* v. *Pittenger, supra.*

---

[2] Hereinafter referred to as Chapter 507.

Statement of the Case

In April, 1970, the so-called Mandated Services Act[3] became law in New York. The act provided for state reimbursement of nonpublic schools for

> expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation.[4]

A three-judge district court thereafter decided that "Chapter 138 violates the establishment clause of the First Amendment." *Committee for Public Education & Religious Liberty* v. *Levitt,* 342 F.Supp. 439, 445 (S.D.N.Y. 1972). The decision was based upon the following rationale:

> . . . By far the greatest portion of the funds appropriated under Chapter 138 is paid for the services of teachers in testing students, and testing is an integral part of the teaching process. As the Court commented in *Lemon,* "teachers have a substantially different ideological character from books." It is this fundamental distinction which makes the limited rules of *Everson* [v. *Board of Education,* 330 U.S. 1 (1947)] and [*Board of Education* v.] *Allen* [392 U.S. 236 (1968)] inapplicable.[5]

---

[3] [1970] Laws of N.Y. ch. 138.

[4] *Id.,* §2.

[5] 342 F.Supp. at 444. At the time of the decision, Section 176.1(b) of the Regulations of the Commissioner of Education required nonpublic schools to

(footnote continued on next page)

This Court noted probable jurisdiction of appeals from this decision[6] and, in its subsequent opinion, took immediate note that "two kinds" of tests and examinations were covered by the Mandated Services Act, "state-prepared" and "traditional teacher-prepared", pointing out that the "overwhelming majority" were of the latter variety. *Levitt* v. *Committee for Public Education & Religious Liberty,* 413 U.S. 472, 473, 474 (1973). This Court cited verbatim the crux of the three-judge court's opinion set forth above[7] and affirmed its rationale as follows:

> . . . Chapter 138 provides for a direct money grant to sectarian schools for performance of various "services." Among those services is the maintenance of a regular program of traditional internal testing designed to measure pupil achievement. Yet, despite the obviously integral role of such testing in the total teaching process, no attempt is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction.
>
> We cannot ignore the substantial risk that these examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church. We do not "assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First

---

conduct in all grades in which instruction is offered a continuing program of individual pupil testing designed to provide an adequate basis for evaluating pupil achievement, and in addition shall administer, rate and report the results of all specific tests or examinations which may be prescribed by the commissioner.

[6] *See* 409 U.S. 977 (1972).

[7] *See* 413 U.S. at 478.

> Amendment." *Lemon* v. *Kurtzman*, 403 U.S., at 618. But the potential for conflict "inheres in the situation," and because of that the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination. See *id.*, at 617, 619. Since the State has failed to do so here, we are left with no choice under [*Committee for Public Education & Religious Liberty* v.] *Nyquist* [413 U.S. 756 (1973)] but to hold that Chapter 138 constitutes an impermissible aid to religion; this is so because the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities.[8]

In conclusion, however, this Court was careful to indicate that actual costs incurred in performing secular services are reimbursable. It stated:

> We hold that the lump-sum payments under Chapter 138 violate the Establishment Clause. Since Chapter 138 provides only for a single per-pupil allotment for a variety of specified services, some secular and some potentially religious, neither this Court nor the District Court can properly reduce that allotment to an amount corresponding to the actual costs incurred in performing reimbursable secular services. *That is a legislative, not a judicial, function.*
>
> Accordingly, the judgment of the District Court is affirmed. 413 U.S. at 482 (emphasis added).

Chapter 507

The New York Legislature, acting pursuant to a specific proposal of the Regents[9] and guided by this Court's decision in *Levitt*, passed by overwhelming majorities in both

---

[8] 413 U.S. at 479-80. *See also id.* at 481.

[9] *See* State Educ. Dep't, *Major Recommendations of the Regents for Legislative Action 1974*, at 12 (Dec. 1973).

houses[10] in April 1974 the act in question, and the Governor signed it into law on May 23, 1974.[11]

Unlike the Mandated Services Act, Chapter 507 does not provide for reimbursement for "traditional teacher-prepared" tests and examinations.[12] Section 3 provides:

> The commissioner shall annually apportion to each qualifying school . . . an amount equal to the actual cost incurred by each school during the preceding school year for providing services required by law to be rendered to the state in compliance with the requirements of the state's pupil evaluation program, the basic educational data system, regents examinations, the statewide evaluation plan, the uniform procedure for pupil attendance reporting, and other similar state prepared examinations and reporting procedures.

Section 5 requires that "[e]ach school which seeks an apportionment pursuant to this act shall maintain a separate account or system of accounts for the expenses incurred in rendering the services required by the state to be performed." Section 7 states that:

> No application for financial assistance under this act shall be approved except upon audit of vouchers or other documents by the commissioner as are necessary to insure that such payment is lawful and proper.

---

[10] In the Assembly, the vote was 134 to 10. *See* [1974] 1 J.N.Y. Assembly 1318. The vote in the Senate was 48 to 7. *See* [1974] J.N.Y. Senate 262.

[11] Chapter 508, adding Section 9 to Chapter 507, became law the same day.

[12] The elimination of the costs involved in administering these exams resulted in a drastically reduced appropriation—down from $28,000,000 a year to $8 000,000. *See* State Educ. Dep't, *Major Recommendations of the Regents for Legislative Action 1975,* at 49 (Dec. 1974).

> The state department of audit and control shall from time to time examine any and all necessary accounts and records of a qualifying school to which an apportionment has been made pursuant to this act for the purpose of determining the cost to such school of rendering the services referred to in section three of this act. If after such audit it is determined that any qualifying school has received funds in excess of the actual cost of providing the services enumerated in section three of this act, such school shall immediately reimburse the state in such excess amount.[13]

Proceedings in District Court

The plaintiffs filed their complaint on June 20, 1974, seeking a declaratory judgment that Chapter 507 is unconstitutional and a permanent injunction against its enforcement. Named as defendants were the New York Comptroller and Commissioner of Education. Thereafter, five nonpublic schools, including appellants herein, were granted leave to intervene as defendants.

A three-judge district court was convened and heard argument based upon the pleadings and the defendants' and the intervenor-defendants' answers to the plaintiffs' interrogatories.

On June 21, 1976, the District Court decided that Chapter 507 "is unconstitutional to the extent that it authorizes

---

[13] In its opinion in *Levitt*, this Court pointed out that the Mandated Services Act

> contains no provision authorizing state audits of school financial records to determine whether a school's actual costs in complying with the mandated services are less than the annual lump sum payment. Nor does the Act require a school to return to the State moneys received in excess of its actual expenses. 413 U.S. at 477 (footnote omitted).

the allocation of funds to sectarian schools."[14] The court's opinion states, in part:

> Absent the decision in *Meek* v. *Pittenger, supra,* we might have found defendants' arguments persuasive. However, in light of the decision in *Meek,* we fail to see any alternative but to declare the statute unconstitutional because it has the primary effect of advancing religion. 414 F. Supp. at 1178; Appendix, p. 10a.

Judgment was entered on July 28, 1976, permanently enjoining enforcement of Chapter 507 as applied to "sectarian schools". Appendix, p. 16a.

The defendants and the intervenor-defendants, except the one not affected by the judgment, have appealed to this Court.

The Question Is Substantial

The public and nonpublic schools in the State of New York comprise a single system of education under the jurisdiction of the Board of Regents and the Commissioner of Education,[15] who are empowered and required to ensure that all the schools in the system give their pupils an ade-

---

[14] 414 F.Supp. at 1180; Appendix, p. 14a. The court took note of Chapter 507's severability clause, Section 9, and thereby declined to enjoin enforcement of the statute as applied to nonsectarian schools, including one intervenor-defendant. *Cf.* Intervenor-Defendant Horace Mann-Barnard School's Responses to Plaintiffs' Interrogatories, Doc. No. 12, Record on Appeal.

[15] In New York State, the Board of Regents, which is composed of 15 members, heads the State Education Department. N.Y. Educ. Law, §101. The Board's chief administrative officer is the Commissioner of Education, who is appointed pursuant to statutory provision by the Regents. With the exception of the Deputy Commissioner, all other officers and employees of the Education Department are appointed by the Commissioner, subject to approval by the Regents. *See id.*

quate education along the lines laid down by statute and by the regulations of the Commissioner. The broad extent to which nonpublic schools in New York are regulated and controlled by state authority with respect to the secular aspects of their operation was noted in *Board of Education* v. *Allen,* 392 U.S. 236 (1968). This Court put the matter of state regulation of nonpublic schools in the following terms:

> . . . Since *Pierce* [v. *Society of Sisters,* 268 U.S. 510 (1925)], a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. Indeed, the State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes. These cases were a sensible corollary of *Pierce* v. *Society of Sisters*: if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function. Another corollary was *Cochran* v. *Louisiana State Board of Education,* 281 U.S. 370 (1930), where appellants said that a statute requiring school books to be furnished without charge to all students, whether they attended public or private schools, did not serve a "public purpose," and so offended the Fourteenth Amendment. Speaking through Chief Justice Hughes, the Court summarized as follows its conclusion that Louisiana's interest in the secular education being provided by private schools made provision of textbooks to students in those schools a properly public concern: "[The State's] interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded." 392 U.S. at 245-47 (footnotes 7, 8 omitted).

So pervasive is the supervision of nonpublic schools by the State of New York that, for example, when such schools desire to offer a course for which there is no state-prepared syllabus, they "need to apply to the Bureau of Secondary Curriculum Development for approval if the course is to be given Regents credit." State Educ. Dep't, *The Secondary School Curriculum of New York State—A Handbook for Administrators* 6 (1970).

Nonpublic schools, as well as public schools, administer numerous state-prescribed examinations, including the so-called PEP (Pupil Evaluation Program[16]) tests, Regents examinations and Regents Scholarship examinations. They are prepared by the State Education Department for administration on a state-wide basis and cover secular subjects which all schools, public and nonpublic, are required by N.Y. Educ. Law § 3204.3 to teach. They serve as an essential tool in the periodic evaluation of the educational progress of all pupils in New York. The role of the school and teacher, whether public or nonpublic, is simply to distribute and collect the papers, maintain order and prevent cheating during the examinations.

---

[16] "The Elementary and Secondary Education Act of 1965 requires the annual use of objective measures to evaluate its role in improving pupil achievement. Towards that end, the Department [of Education] has established a statewide testing program to assess the achievement status of every pupil in selected grades in New York State. Each fall, *all public and nonpublic schools* in the State administer the following tests:

Grades 3 and 6	Reading Test for New York State Elementary Schools, Form A Arithmetic Test for New York State Secondary Schools, Form A
Grade 9	Minimum Competence Test in Reading for New York State Secondary Schools Minimum Competence Test in Arithmetic Fundamentals for New York State Secondary Schools"

State Educ. Dep't, *Handbook on Examinations and Scholarships* 29 (1968) (emphasis added).

Nonpublic schools, as well as public schools, are also required to maintain numerous types of records, most significantly those relating to the attendance and health of their pupils. In sum, the regulation of nonpublic education by the State of New York is so complete and its equivalency to public education so well accepted that the State Board of Regents confers diplomas upon graduates of nonpublic high schools. *See* N.Y. Educ. Law § 208.

Under Chapter 507, the five intervenor-defendants were reimbursed as follows:

Expenditure Item	*H-Mann*	*LaSalle*	*LILHS*	*St. M.*	*Rambam*
Pupil Evaluation Program	$ 385.74	$ 305.00	$ 362.05	$ 389.27	$ 552.79
Basic Educational Data Services	32.57	101.00	47.74	5.52	66.83
Regents Examinations	343.73	119.00	459.59		
Attendance Records	20,367.00	11,957.00	8,934.92	5,307.07	5,102.62
Secondary School Reports	198.56	87.00	33.79		
Other		507.00			
Total	$21,327.60	$13,076.00	$9,838.09	$5,701.86	$5,722.24

The Forms SA-186 and SA-187, which the schools were required to file in conformity with Chapter 507, set forth in detail how these figures were arrived at.[17] The Forms SA-187 show that the aggregate base costs of Horace Mann-Barnard School, for example, were $2,533,928.27 in contrast to the twenty-one thousand dollars reimbursed by the State and that the aggregate costs of St. Michael School, to take another example, were $179,219.19 as opposed to the fifty-seven hundred dollars in reimbursement.

As indicated above at pages 4 to 6, *supra*, the reason both the three-judge District Court and this Court

[17] *See* the intervenor-defendants' responses to the plaintiffs' interrogatories, Record on Appeal, Doc. Nos. 11-15.

found the Mandated Services Act to be unconstitutional was that "no attempt [wa]s made under the statute, and no means [we]re available, to assure that internally prepared tests [we]re free of religious instruction." *Levitt* v. *Committee for Public Education & Religious Liberty,* 413 U.S. at 480. This constitutional infirmity does not exist in Chapter 507, which makes no provision whatsoever for reimbursement of costs incurred in administering teacher-prepared examinations.

Plaintiffs argued below that administration of the state-prepared examinations "may be used by overzealous teachers as a means to inculcate religious values."[18] This is obviously incorrect, as can be attested by any person who has taken Regents or PEP examinations, in which the teacher's sole function is to distribute the prepared examinations, maintain order, prevent cheating and collect the examination papers for transmission to state educational authorities. In *Levitt,* this Court took immediate note of the distinction between "(a) state-prepared examinations, such as the 'Regents examinations' and the 'Pupil Evaluation Program Tests,' and (b) traditional teacher-prepared tests." 413 U.S. at 475 (footnote omitted). Indeed, while referring to and concentrating throughout its opinion on "teacher-prepared"[19] or "internal"[20] testing, not once did this Court intimate that the State-prepared examinations are in the same, constitutionally-suspect category. On the contrary, this Court's opinion in *Levitt* specifically implied that reimbursement for administration of these examinations and the other strictly neutral services is constitutional. For example:

---

[18] Brief for Plaintiffs, p. 15, Record on Appeal, Doc. No. 18.

[19] 413 U.S. at 475 and n. 3, 481.

[20] 413 U.S. at 477 n. 5, 480.

> We do not doubt that the New York Legislature had a "secular legislative purpose" in enacting Chapter 138. See *Epperson* v. *Arkansas*, 393 U.S. 97 (1968). The first section of the Act provides that the State has a "primary responsibility" to assure that its youth receive an adequate education; that the State has the "duty and authority" to examine and inspect all schools within its borders to make sure that adequate educational opportunities are being provided; and that the *State has a legitimate interest in assisting those schools insofar as they aid the State in fulfilling its responsibility.* 413 U.S. at 479-80 n. 7 (emphasis added).

Such a position is based, of course, upon significant, long-standing precedent. For example, in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), this Court stated:

> . . . Our decisions from *Everson* [v. *Board of Education*, 330 U.S. 1 (1947)] to *Allen* have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause. 403 U.S. at 616-17.

In *Tilton* v. *Richardson*, 403 U.S. 672 (1971), Chief Justice Burger stated in his lead opinion:

> The simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago in *Bradfield* v. *Roberts*, 175 U.S. 291 (1899). There a federal construction grant to a hospital operated by a religious order was upheld. 403 U.S. at 679.

In *Hunt* v. *McNair*, 413 U.S. 734 (1973), Mr. Justice Powell pointed out that

> the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends. 413 U.S. at 743.

And in *Meek* v. *Pittenger*, 421 U.S. 349 (1975), the case so heavily relied upon by the court below, Mr. Justice Stewart again reminded us that

> it is clear that not all legislative programs that provide indirect or incidental benefit to a religious institution are prohibited by the Constitution. 421 U.S. at 359.

Indeed, a three-judge district court in *Wolman* v. *Essex*, 417 F.Supp. 1113 (S.D. Ohio 1976),[21] *appeal docketed*, No. 76-496, 45 U.S.L.W. 3307 (Oct. 7, 1976), recently upheld the constitutionality of an Ohio statute, which, *inter alia*, authorized local school districts to supply for use in nonpublic schools "such standardized tests and scoring systems as are in use in the public schools of the state" and which are "used to measure the progress of all students in secular subjects":

> Unlike the testing program invalidated in *Levitt*, the program authorized by the Ohio statute does not involve tests prepared by nonpublic school teachers, and therefore cannot result in the danger of inadvertent religious indoctrination. Rather, the Ohio statute authorizes the provision of only those same tests and scoring services as are provided in the public schools of the local district. The content of such tests, then, is necessarily and without further precaution restricted to the secular content of the state-required secular courses taught in the nonpublic schools. Since nonpublic school personnel are involved in neither the sub-

[21] The district court decisions in *Wolman* and in this case were both handed down on June 21, 1976.

> stantive drafting of the tests nor in the scoring of those tests, there is no possibility of inadvertent injection of religious doctrine in the administration of the tests. Likewise, because nonpublic schools personnel will be involved only ministerially in the administration of the tests, the program will not foster an excessive entangling relationship between the state and the church-related school. 417 F.Supp. at 1124.

We submit that the decision in *Wolman,* involving a statutory provision similar to Chapter 507, is consistent with this Court's decision in *Levitt* and more recent cases and that, in view of the direct conflict between the decisions in *Wolman* and this case, review by this Court herein is necessary and appropriate.

Meek v. *Pittenger, supra,* is not, in our view, dispositive of this issue, as the court below ruled. The statute under review in that case related to the provision of services or equipment which were arguably related to the teaching process in the nonpublic schools, whether in the classroom or in the gymnasium or in connection with counseling, speech therapy and the like,[22] and which could be used in connection with the inculcation of religion. *See* 421 U.S. at 366 n. 16. Indeed, the Court has recently noted in *Roemer* v. *Board of Public Works of Maryland,* —— U.S. ——, 49 L.Ed. 179 (1976), the basis of the *Meek* ruling was the "danger that the teachers, in such a sectarian setting, would allow religion to seep into their instruction." 49 L.Ed. at 192. This, we submit, cannot occur with respect to standardized state-prepared examinations, as to which the teacher's role is entirely administrative. Nor can there be any basis for a contention that the maintenance of re-

---

[22] *See* 421 U.S. at 363.

quired attendance records is a part of the pedagogic process which could be used as a means of inculcating religion.

Furthermore, there is no basis for the District Court's finding that Chapter 507 is invalid because it, in effect, subsidizes the operating costs of nonpublic schools by reimbursing them for expenses which they otherwise would be required to sustain. This is incorrect, as recently noted in *Hunt* v. *McNair,* 413 U.S. 734 (1973), where this Court stated that:

> the Court has not accepted the recurrent argument that all aid is forbidden because aid in one aspect of an institution frees it to spend its resources on religious ends.

See also Roemer v. *Board of Public Works of Maryland,* 49 L.Ed. at 179, 188 n. 14 and cases cited therein.

• • •

The other elements of the Mandated Services Act which troubled this Court were the fact that there was no provision authorizing state audits to determine the validity of the "lump sum" payments and the fact that there was no provision requiring the return of excess payments to the State. *See Levitt* v. *Committee for Public Education & Religious Liberty,* 413 U.S. at 477.

These causes for concern do not exist in Chapter 507. Section 7 of the act makes specific provision for an audit. It also provides for immediate reimbursement of the State where money in excess of the amount to which a school is entitled is found to have been paid. Furthermore, there are no "lump sum" payments under Chapter 507. Rather, the act reimburses individual, *actual* costs in contrast with the "lump sum" reimbursement formula(s) of the Man-

dated Services Act. If one reviews the figures[23] extracted from the Forms SA-186 and SA-187 (and the forms themselves) filed by the intervenor-defendants herein, the specificity is readily apparent. It is also readily apparent that costs incurred by the schools in taking and reporting attendance comprise the lion's share of the amounts reimbursed. Attendance taking and reporting hardly leave room for sectarian activity.

This Court has never held that all contact between church and state is constitutionally impermissible. For example, most recently in *Roemer,* it was pointed out by Mr. Justice Blackmun in his lead opinion that:

> A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church. In fact, our State and Federal Governments impose certain burdens upon, and impart certain benefits to, virtually all of our activities, and religious activity is not an exception. The Court has enforced a scrupulous neutrality by the State, as among religions, and also as between religious and other activities, but a hermetic separation of the two is an impossibility it has never required. 49 L.Ed.2d at 187 (footnote omitted).

In *Lemon,* Chief Justice Burger stated:

> Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. . . . Fire inspections, building and zoning regulations, *and state requirements under compulsory school-attendance laws are examples of necessary and permissible*

---

[23] *Supra,* p. 12.

contacts. 403 U.S. at 614 (citations omitted; emphasis added).

In *Zorach* v. *Clauson,* 343 U.S. 306, 312 (1952), Mr. Justice Douglas, writing for the Court, noted that the "First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State." [24]

In this case, the State reimbursement is limited to standardized state-prepared examinations and to the maintenance of attendance and other non-ideological records. These have an obviously secular purpose. They do not, and indeed by their nature cannot, have the primary effect of advancing religion. They do not result in excessive entanglement or involvement beyond that inherent in New York's historic regulation of the secular aspects of nonpublic school education.

---

[24] The Religion Clauses seek only to "mark boundaries to avoid *excessive* entanglement." *Walz* v. *Tax Comm'n of the City of New York,* 397 U.S. 664, 670 (1970) (emphasis added).

Conclusion

In view of the foregoing, it is submitted that the District Court was in error in concluding that Chapter 507 is unconstitutional as applied to appellants, that the question presented by this appeal is substantial and of extraordinary public importance and that this Court should note probable jurisdiction.

Dated: November 19, 1976

Respectfully submitted,

RICHARD E. NOLAN
Attorney for Appellants
LaSalle Academy, Long Island Lutheran High School and St. Michael School
1 Chase Manhattan Plaza
New York, New York 10005
Tel.: (212) 422-3400

THOMAS J. AQUILINO, JR.
Of Counsel

DENNIS RAPPS
Attorney for Appellant
Yeshivah Rambam
National Jewish Commission
on Law and Public Affairs
(COLPA)
66 Court Street
Brooklyn, New York 11201
Tel.: (212) 875-5360

APPENDIX

Opinion of District Court
Dated June 21, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Argued March 31, 1976 Decided June 21, 1976

74 Civ. 2648

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,

Plaintiffs,

—against—

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Defendants,

—and—

HORACE MANN-BARNARD SCHOOL, LA SALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL, ST. MICHAEL SCHOOL and YESHIVAH RAMBAM,

Intervenor-defendants.

Before:

MANSFIELD, *Circuit Judge*, and LASKER and WARD, *District Judges.*

Opinion of District Court

WARD, *District Judge*

This case requires us to determine whether Chapter 507, as amended by Chapter 508, of the 1974 Laws of New York ("the statute"), which provides for reimbursement to private schools of expenses allocable to the performance of certain state "mandated" pupil testing and record keeping, is offensive to the Establishment Clause of the First Amendment.

Plaintiffs, who commenced this action less than one month after the statute was signed into law, are an association, with numerous organization members, whose objectives include opposition to the use of public funds for the support of sectarian schools, and individual New York State taxpayers. Defendants are the Commissioner of Education and the State Comptroller. Intervenor-defendants are one non-sectarian and four sectarian private schools which receive funds pursuant to the statute. Plaintiffs seek a declaration that the statute is unconstitutional and an injunction against the allocation and use of public funds for the support of religious schools.

Upon the request of the parties, this three-judge court was convened pursuant to 28 U.S.C. §§ 2281 and 2283. The parties have agreed that the case shall be determined on the pleadings and the defendants' and intervenor-defendants' answers to plaintiffs' interrogatories.

I

The statute, which became effective July 1, 1974, provides for reimbursement to non-public schools of the "actual cost" of complying with state requirements for pupil attendance

reporting and the administration of state prepared examinations such as regents examinations, the pupil evaluation program, and the basic educational data system.[1] These reports and tests are required of public and non-public schools alike. The statute was passed by the Legislature, pursuant to the proposal of the Regents, to replace Chapter 138 of the 1970 Laws of New York which had been declared unconstitutional in *Levitt* v. *Committee for Public Education & Religious Liberty,* 413 U.S. 472 (1973). It was drafted to eliminate those features of Chapter 138 which the Supreme Court found offensive to the First Amendment, specifically reimbursement for traditional teacher-prepared examinations and the failure to limit reimbursement to actual costs incurred.

According to defendants' answers to plaintiffs' interrogatories, there are 1954 non-public schools eligible to receive reimbursement pursuant to the statute, approximately 85% of which are religiously affiliated. Although the characteristics of these sectarian institutions vary widely, schools which

---

[1] The operative provision of the statute is contained in §3, which provides:

> The commissioner shall annually apportion to each qualifying school, for school years beginning on and after July first, nineteen hundred seventy-four, an amount equal to the actual cost incurred by each such school during the preceding school year for providing services required by law to be rendered to the state in compliance with the requirements of the state's pupil evaluation program, the basic educational data system, regents examinations, the statewide evaluation plan, the uniform procedure for pupil attendance reporting, and other similar state prepared examinations and reporting procedures.

> (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial or dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, and/or (10) impose religious restrictions on what the faculty may teach

are permissible beneficiaries.[2]

Schools must apply for reimbursement listing the amount claimed for each service rendered separately.[3] Reimbursable costs include teacher salaries, fringe benefits, supplies, and other contractual expenditures such as data processing services. Section 7 of the statute requires schools applying for financial assistance to submit vouchers, capable

---

[2] Although four of the intervenor-defendants are religiously affiliated, none meets all of the characteristics enumerated in the text.

[3] Section 4 of the statute provides:

> Each school which seeks an apportionment pursuant to this act shall submit to the commissioner an application therefor, together with such additional reports and documents as the commissioner may require, at such times, in such form and containing such information as the commissioner may prescribe by regulation in order to carry out the purposes of this act.

of audit, to insure the propriety of payment.[4] To implement this section, defendants have promulgated forms which require applicants for reimbursement to list separately the amount claimed for each reimbursable cost for each reimbursable service. For reimbursement of personnel salaries and fringe benefits, the defendants also require the submission of a form entitled "Justification of Salary and Fringe Benefit Costs Claimed For State Aid For Testing, Reporting and Evaluating." Such reimbursable costs are calculated on this form by first determining the percentage of total work time spent performing reimbursable services. Gross wages and fringe benefits are then multiplied by the resulting percentage. It should be noted that the resulting reimbursable amount does not represent any additional sum expended over and above ordinary teacher and other personnel compensation, but rather represents a percentage of compensation which would be paid whether or not employee time was spent in performing state required services.

The statute, also, makes a provision for further audit of underlying records, if necessary, and reimbursement to the state in the event of overpayment.[5] Defendants have pro-

---

[4] Section 7 states in pertinent part:

> No application for financial assistance under this act shall be approved except upon audit of vouchers or other documents by the commissioner as are necessary to insure that such payment is lawful and proper.

[5] Section 7 of the Act provides in pertinent part:

> The state department of audit and control shall from time to time examine any and all necessary accounts and records of a qualifying school to which an apportionment has been made pursuant to this act for the purpose of determining the cost to such school of rendering the services referred to in section three of this act. If after such audit it is determined

mulgated suggested accounting procedures so that records are kept which are capable of such an audit.[6]

From an examination of the intervenor-defendants' answers to plaintiffs' interrogatories, the bulk of reimbursement claimed is for salaries and fringe benefits. The total amounts claimed vary from school to school, depending in part upon the services performed. For example, for teacher salaries and fringe benefits for attendance, the amount claimed varies from approximately 1% to 5.4% of the aggregate cost of these budget items to the different schools. It has been estimated that the cost to the state of providing reimbursement to private schools, pursuant to the statute, will be between $8,000,000 and $10,000,000 annually.

---

that any qualifying school has received funds in excess of the actual cost of providing the services enumerated in section three of this act, such school shall immediately reimburse the state in such excess amount.

[6] Section 5 of the statute provides:

Each school which seeks an apportionment pursuant to this act shall maintain a separate account or system of accounts for the expenses incurred in rendering the services required by the state to be performed in connection with the reporting, testing and evaluation program enumerated in section three of this act. Such records and accounts shall contain such information and be maintained in accordance with regulations issued by the commissioner, but for expenditures made in the school year nineteen hundred seventy-three-seventy-four, the application for reimbursement made in nineteen hundred seventy-four pursuant to section four of this act shall be supported by such reports and documents as the commissioner shall require. In promulgating such record and account regulations and in requiring supportive documents with respect to expenditures incurred in the school year nineteen hundred seventy three-four, the commissioner shall facilitate the audit procedures described in section seven of this act. The records and accounts for each school year shall be preserved at the school until the completion of such audit procedures.

II

The complaint alleges that this statutory scheme for providing financial assistance to sectarian and non-sectarian schools violates the Establishment Clause in that its primary effect is to advance religion and in that it results in an excessive entanglement of state government in religion. The complaint, also, alleges a violation of the Free Exercise Clause of the First Amendment in that the statute constitutes compulsory taxation for the support of religion and religious schools.[7]

Defendants, for their part, argue that the statute does not offend the Constitution because reimbursement is limited to services which are clearly secular and that no excessive entanglement results from the provision for an optional audit of books and accounts in that there is no audit of educational content.

III

We turn now to the constitutional question posed: Whether the First Amendment's prohibition of any law "respecting the establishment of religion" is violated by a state law which provides for direct payments by the state to non-public sectarian schools for those portions of their operating costs which are attributable to compliance with state attendance, testing and reporting requirements. The constitutional standards may be easily stated:

> "First, the statute must have a secular legislative purpose. . . . Second, it must have a 'primary effect' that

[7] Plaintiffs have not pressed this claim before the Court. In view of our disposition on Establishment Clause grounds, we do not reach the Free Exercise claim.

> neither advances nor inhibits religion. . . . Third, the statute and its administration must avoid excessive government entanglement with religion." *Meek* v. *Pittenger,* 421 U.S. 349, 358 (1975) (citations omitted).

Unfortunately, these tests are more easily stated than applied.

> For it is evident from the numerous opinions of the [Supreme] Court, and of Justices in concurrence and dissent in the leading cases applying the Establishment Clause, that no "bright line" guidance is afforded. Instead, while there has been general agreement upon the applicable principles and upon the framework of analysis, the Court has recognized its inability to perceive with invariable clarity the "lines of demarcation in this extraordinarily sensitive area of constitutional law." *Lemon* v. *Kurtzman,* 403 U.S. 602, 612 (1971).

Committee for Public Education & Religious Liberty v. *Nyquist,* 413 U.S. 756, 761 n. 5 (1973). Thus, with due regard for the complexity of the questions, we turn to the application of the standards to the facts of the instant case.

We need not pause long to determine whether the statute passes constitutional muster under the first part of the tripartite test. The legislative purpose is contained in Section 1 of Chapter 507 as follows:

> The state has the responsibility to provide educational opportunity of a quality which will prepare its citizens for the challenges of American life in the last decades of the twentieth century.

To fulfill this responsibility, the state has the duty and authority to evaluate, through a system of uniform state testing and reporting procedures, the quality and effectiveness of instruction to assure that those who are attending instruction, as required by law, are being adequately educated within their individual capabilities.

In public schools these fundamental objectives are accomplished in part through state financial assistance to local school districts.

More than seven hundred thousand pupils in the state comply with the compulsory education law by attending nonpublic schools. It is a matter of state duty and concern that such nonpublic schools be reimbursed for the actual costs which they incur in providing services to the state which they are required by law to render in connection with the state's responsibility for reporting, testing and evaluating.

The predecessor statute, Chapter 138, 1970 Laws of New York, had a very similar legislative purpose. In *Levitt* v. *Committee for Public Education & Religious Liberty, supra,* the court stated:

> We do not doubt that the New York legislature had a "secular legislative purpose" in enacting Chapter 138. 413 U.S. at 479, n. 7. We are constrained to hold likewise here.

The nub of the controversy between the respective parties focuses on the second and, for this case, the crucial test of the primary effect of the statute. Defendants argue that

the payments provided by the statute are for "neutral, secular and non-ideological" services performed by the non-public schools to serve the state's secular interests in the education they provide. As such, defendants conclude that these payments do not have the primary effect of advancing religion and that, if anything, there is only the incidental effect that the institutions' funds may be "freed up" for the furtherance of their religious mission. Further, they contend that in *Levitt* v. *Committee for Public Education & Religious Liberty, supra,* the court impliedly held that payments such as those authorized by the statute would be constitutionally permissible.

Absent the decision in *Meek* v. *Pittenger, supra,* we might have found defendants' arguments persuasive. However, in light of the decision in *Meek,* we fail to see any alternative but to declare the statute unconstitutional because it has the primary effect of advancing religion.

At issue, in *Meek,* was the constitutionality of two Pennsylvania statutes which provided auxiliary services and instructional material and equipment to the non-public schools of the state, 75% of which were sectarian in character. Auxiliary services included counseling, testing, psychological services, speech and hearing therapy and special education. Instructional materials included periodicals, photographs, maps, records and films. Instructional equipment included audiovisual and laboratory equipment. The Supreme Court held that the statutes were unconstitutional except insofar as they provided for the loan of textbooks to non-public school students. With respect to the loan of instructional material and equipment, the court found that while the materials themselves may be secular and non-

ideological, the aid thereby provided had the primary and direct effect of advancing the religious mission of the sectarian beneficiaries of the Act. The court stated:

> To be sure, the material and equipment that are the subjects of the loan—maps, charts, and laboratory equipment, for example—are "self-polic[ing], in that starting as secular, nonideological and neutral, they will not change in use." 374 F. Supp. 639, 660. But faced with the substantial amounts of direct support authorized by Act 195, it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and to then characterize Act 195 as channeling aid to the secular without providing direct aid to the sectarian. Even though earmarked for secular purposes, "when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission," state aid has the impermissible primary effect of advancing religion. *Hunt* v. *McNair,* 413 U.S. 734, 743.
>
> • • •
>
> Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole. "[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. . . . For this reason, Act 195's direct aid to Pennsylvania's predominantly church-related, nonpublic elementary and secondary schools, even

> though ostensibly limited to wholly neutral, secular instructional material and equipment, inescapably results in the direct and substantial advancement of religious activity, cf. Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S., at 781-783 and n. 39, and thus constitutes an impermissible establishment of religion.

413 U.S. at 365-66 (footnote omitted).

We need only repeat what the Court stated in *Meek* to dispose of the constitutional question here. In the present case, it is conceded that the attendance taking and test administration are performed during regular school hours by school personnel and would be so performed whether or not reimbursement is available. It is, also, conceded that the payments made pursuant to the statute do not represent extraordinary expenditures necessitated primarily by compliance with state requirements. In order to continue to qualify as institutions providing an educational alternative to public schools, the private school beneficiaries must continue to comply with the state's reporting and testing requirements. *See, e.g.,* N.Y. Education Law §§ 214-216, 3210.2, 3211 (McKinney's 1969, 1970). Compliance with state laws regulating education is as much a part of the educational function of private schools as classroom instruction in secular subjects.[8] For the state to reimburse private schools for compliance in the manner provided by the statute is, in reality, to subsidize their operating costs.

---

[8] Of course, the mere application of a state law to a school system does not necessarily "regulate education." *See, e.g., Meek* v. *Pittenger,* 421 U.S. 349, 364 (1975).

In light of these facts, it is clear that the aid to the secular functions of sectarian schools provided by the statute is in fact aid to the sectarian school enterprise as a whole and results in the direct advancement of religion.

The sole basis offered by defendants and intervenors for distinguishing the decision in *Meek* from the instant case is that the monetary aid provided any one school is insubstantial in terms of each school's operating expenses. We cannot agree. In *Meek,* the court characterized the $12 million authorized to be paid to the 1320 non-public schools of Pennsylvania of which 75% had religious affiliations as "massive" and "substantial". We can perceive no legally relevant distinction between the $12 million of public funds involved in *Meek* and the $8-$10 million at issue here.

Moreover, the touchstone under the Establishment Clause is not how much public support any one religious institution receives but rather that public funds are used to support religion in general.

> "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."

Everson v. *Board of Education,* 330 U.S. 1, 16 (1947).

Since the statute under consideration thus fails to meet the second prong of the standard established by the Supreme Court for constitutional review of such provisions, it becomes unnecessary to decide whether it satisfies the third requirement, avoidance of excessive entanglement with religion.

Accordingly, we hold that Chapter 507, as amended by Chapter 508, is unconstitutional to the extent that it authorizes the allocation of funds to sectarian schools and we enjoin the application of the Act to such schools.[9]

Settle judgment on notice.

/s/ WALTER R. MANSFIELD
U.S.C.J.

/s/ MORRIS E. LASKER
U.S.D.J.

/s/ ROBERT J. WARD
U.S.D.J.

---

[9] Chapter 508 added a severability clause to the Act reading as follows:

> § 9. *In enacting this chapter it is the intention of the legislature that if section seven or any other provision of this act or any rules or regulations promulgated thereunder shall be held by any court to be invalid in whole or in part or inapplicable to any person or situation, all remaining provisions or parts thereof or remaining rules and regulations or parts thereof not so invalidated shall nevertheless remain fully effective as if the invalidated portion had not been enacted or promulgated, and the application of any such invalidated portion to other persons not similarly situated or other situations shall not be affected thereby.*

Unlike the situation in *Meek* v. *Pittenger*, see 421 U.S. at 371 n. 10, this clause is a clear statement of the legislature's intent to have the act remain in force as applied to nonsectarian schools, even if its application to sectarian schools were held to violate the Establishment Clause. Compare *Sloan* v. *Lemon*, 413 U.S. 825, 833-34 & n. 10.

Judgment of District Court

[Filed July 26, 1976]

UNITED STATES DISTRICT COURT

Southern District of New York

74 Civ. 2648 (RJW)

Committee for Public Education and Religious Liberty, Bert Adams, Barbara Brooks, Naomi Cowen, Robert B. Essex, Florence Flast, Charlotte Green, Helen Henkin, Martha Laties, Blanche Lewis, Ellen Meyer, Rev. Arthur W. Mielke, Edward D. Moldover, Aryeh Neier, David Seeley, Howard M. Squadron, Charles H. Sumner and Cynthia Swanson,

Plaintiffs,

—against—

Arthur Levitt, as Comptroller of the State of New York, and Ewald B. Nyquist, as Commissioner of Education of the State of New York,

Defendants,

—and—

Horace Mann-Barnard School, La Salle Academy, Long Island Lutheran High School, St. Michael School and Yeshivah Rambam,

Intervenor-defendants.

Judgment of District Court

The parties having agreed that this case be determined on the pleadings and the defendants' and intervenor-defendants' answers to plaintiffs' interrogatories, and this case having come on to be heard before Hon. Walter R. Mansfield, Circuit Judge, and Hon. Morris E. Lasker and Robert J. Ward, District Judges on March 31, 1976, and the issue having been duly heard and a decision having been duly rendered, it is hereby

ORDERED, ADJUDGED AND DECREED, that Chapter 507, as amended by Chapter 508, of the 1974 Laws of New York is unconstitutional to the extent that it authorizes the allocation of funds to sectarian schools, and defendants are hereby permanently enjoined from applying said Act to such schools.

Dated: New York, New York
July 22, 1976.

/s/ WALTER R. MANSFIELD
U.S.C.J.

/s/ MORRIS E. LASKER
U.S.D.J.

/s/ ROBERT J. WARD
U.S.D.J.

JUDGMENT ENTERED—7/28/76
RAYMOND F. BURGHARDT
Clerk

Notice of Appeal of Yeshivah Rambam

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2648 RJW

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *et al.*,

Plaintiffs,

—against—

ARTHUR LEVITT, *et al.*,

Defendants.

NOTICE OF APPEAL

SIRS:

PLEASE TAKE NOTICE that Intervenor-Defendant Yeshivah Rambam hereby appeals to the Supreme Court of the United States from the judgment of the Three-Judge District Court entered in this action on July 26, 1976 and from each and every part of said judgment. This appeal is taken pursuant to 28 U.S.C. 1253.

DATED: September 21, 1976

/s/ DENNIS RAPPS
DENNIS RAPPS, Esq.
Attorney for Intervenor-Defendant Yeshivah Rambam
c/o National Jewish Commission on Law and Public Affairs (COLPA)
66 Court Street
Brooklyn, New York 11201

Notice of Appeal of Yeshivah Rambam

To:

LEO PFEFFER, Esq.
Attorney for Plaintiffs
15 East 84th Street
New York, New York 10028

LOUIS J. LEFKOWITZ, Esq.
Attorney General of the State of New York
Attorney for Defendants
World Trade Center
New York New York 10047

DAVIS, POLK & WARDWELL, Esqs.
Attorneys for Intervenor-Defendants Other Than Yeshivah Rambam
1 Chase Manhattan Plaza
New York, New York 10005

CLERK OF THE COURT OF THE SOUTHERN DISTRICT OF NEW YORK
U.S. District Courthouse
Foley Square
New York, New York 10007

Notice of Appeal of La Salle Academy, Long Island Lutheran High School and St. Michael School

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2648 RJW

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,

Plaintiffs,

—against—

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Defendants,

—and—

HORACE MANN-BARNARD SCHOOL, LA SALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL, ST. MICHAEL SCHOOL and YESHIVAH RAMBAM,

Intervenor-defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice of Appeal of La Salle Academy et al.

SIRS:

Notice is hereby given that the above-named intervenor-defendants La Salle Academy, Long Island Lutheran High School and St. Michael School hereby appeal to the Supreme Court of the United States from the Judgment entered in this action on July 28, 1976 adjudging Chapter 507, as amended by Chapter 508, of the 1974 Laws of New York unconstitutional to the extent that it authorizes the allocation of funds to sectarian schools and permanently enjoining the defendants from applying the act to such schools.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: New York, N. Y.
September 22, 1976

Yours, etc.

DAVIS POLK & WARDWELL
By /s/ RICHARD E. NOLAN

A Member of the Firm
Attorneys for Intervenor-defendants La Salle Academy, Long Island Lutheran High School and St. Michael School
1 Chase Manhattan Plaza
New York, New York 10005
Tel.: 422-3400

Notice of Appeal of La Salle Academy et al.

To:

LEO PFEFFER, Esq.
Attorney for Plaintiffs
15 East 84th Street
New York, New York 10028

HONORABLE LOUIS J. LEFKOWITZ
Attorney General of the State of New York

Mrs. JEAN M. COON
Assistant Solicitor General
Attorney for Defendants
Department of Law
Justice Building
Albany, New York 12224

DENNIS RAPPS, Esq.
Attorney for Intervenor-defendant Yeshivah Rambam
c/o National Jewish Commission on Law and Public Affairs (COLPA)
66 Court Street
Brooklyn, New York 11201

Chapter 507 of the Laws of 1974 as Amended by Chapter 508 Thereof

AN ACT—To provide for the apportionment of state monies to certain nonpublic schools, to reimburse them for their expenses in complying with certain state requirements for the administration of state testing and evaluation programs and for participation in state programs for the reporting of basic educational data

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Legislative findings. The legislature hereby finds and declares that:

The state has the responsibility to provide educational opportunity of a quality which will prepare its citizens for the challenges of American life in the last decades of the twentieth century.

To fill this responsibility, the state has the duty and authority to evaluate, through a system of uniform state testing and reporting procedures, the quality and effectiveness of instruction to assure that those who are attending instruction, as required by law, are being educated within their individual capabilities.

In public schools these fundamental objectives are accomplished in part through state financial assistance to local school districts.

More than seven hundred thousand pupils in the state comply with the compulsory education law by attending nonpublic schools. It is a matter of state duty and concern that such nonpublic schools be reimbursed for the actual

costs which they incur in providing services to the state which they are required by law to render in connection with the state's responsibility for reporting, testing and evaluating.

§ 2. Definitions.

1. "Commissioner" shall mean the state commissioner of education.

2. "Qualifying school" shall mean a nonprofit school in the state, other than a public school, which provides instruction in accordance with section thirty-two hundred four of the education law.

§ 3. Apportionment.

The commissioner shall annually apportion to each qualifying school, for school years beginning on and after July first, nineteen hundred seventy-four, an amount equal to the actual cost incurred by each school during the preceding school year for providing services required by law to be rendered to the state in compliance with the requirements of the state's pupil evaluation program, the basic educational data system, regents examinations, the statewide evaluation plan, the uniform procedure for pupil attendance reporting, and other similar state prepared examinations and reporting procedures.

§ 4. Application.

Each school which seeks an apportionment pursuant to this act shall submit to the commissioner an application

therefor, together with such additional reports and documents as the commissioner may require, at such times, in such form and containing such information as the commissioner may prescribe by regulation in order to carry out the purposes of this act.

§ 5. Maintenance of records.

Each school which seeks an apportionment pursuant to this act shall maintain a separate account or system of accounts for the expenses incurred in rendering the services required by the state to be performed in connection with the reporting, testing and evaluation program enumerated in section three of this act. Such records and accounts shall contain such information and be maintained in accordance with regulations issued by the commissioner, but for expenditures made in the school year nineteen hundred seventy-three-seventy-four, the application for reimbursement made in nineteen hundred seventy-four pursuant to section four of this act shall be supported by such reports and documents as the commissioner shall require. In promulgating such record and account regulations and in requiring supportive documents with respect to expenditures incurred in the school year nineteen hundred seventy-three-four, the commissioner shall facilitate the audit procedures described in section seven of this act. The records and accounts for each school year shall be preserved at the school until the completion of such audit procedures.

Chapter 507 of the 1974 Laws of New York
as Amended by Chapter 508

§ 6. Payment.

No payment to a qualifying school shall be made until the commissioner has approved the application submitted pursuant to section four of this act.

§ 7. Audit.

No application for financial assistance under this act shall be approved except upon audit of vouchers or other documents by the commissioner as are necessary to insure that such payment is lawful and proper.

The state department of audit and control shall from time to time examine any and all necessary accounts and records of a qualifying school to which an apportionment has been made pursuant to this act for the purpose of determining the cost to such school of rendering the services referred to in section three of this act. If after such audit it is determined that any qualifying school has received funds in excess of the actual cost of providing the services enumerated in section three of this act, such school shall immediately reimburse the state in such excess amount.

§ 8. Noncorporate entities.

Apportionments made for the benefit of any school which is not a corporate entity shall be paid, on behalf of such school, to such corporate entity as may be designated for such purpose pursuant to regulations promulgated by the commissioner. A school which is a corporate entity may designate another corporate entity for the purpose of re-

ceiving apportionments made for the benefit of such school pursuant to this act.

§ 9. In enacting this chapter it is the intention of the legislature that if section seven or any other provision of this act or any rules or regulations promulgated thereunder shall be held by any court to be invalid in whole or in part or inapplicable to any person or situation, all remaining provisions or parts thereof or remaining rules and regulations or parts thereof not so invalidated shall nevertheless remain fully effective as if the invalidated portion had not been enacted or promulgated, and the application of any such invalidated portion to other persons not similarly situated or other situations shall not be affected thereby.

§ 10. This act shall take effect July first, nineteen hundred seventy-four.